jurisdiction of this Court on appeal rests on the provisions of the Expediting Act approved February 11, 1903, as amended, and Section 238 (1) of the Judicial Code, as amended, as extended by Section 401 (d) of the Communications Act of 1934, as amended (47 U. S. C. 401 (d)).

QUESTIONS PRESENTED

All of the appellants operate hotels in the District of Columbia. When guests in these hotels make, or receive collect, any interstate or foreign long distance telephone calls, they are required to pay the hotels not only the tariff charges plus the federal taxes applicable to such calls but also an extra charge, or "surcharge", of approximately 10 per cent of the total of the tariff charge plus tax. This "surcharge" is retained by the hotels. Since February 15, 1944, the applicable tariffs of the American Telephone and Telegraph Company and The Chesapeake and Potomac Telephone Company on file with the Federal Communications Commission have provided that "message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff." The court below enjoined appellants from charging, demanding, collecting or receiving the surcharges referred to above.

The questions presented are:

1. Whether the provisions of the Communications Act of 1934, as amended, apply to the surcharges in question, and whether the Federal Communications Commission has jurisdiction over such surcharges.

2. Whether the tariff in question is valid.

3. Whether the action of appellant hotels in collecting the surcharges in question constitutes a violation of the terms of the tariff in question.

4. Whether the action of appellant hotels in collecting the surcharges in question can be enjoined under the Communications Act of 1934, as amended.

STATUTE INVOLVED

The pertinent sections of the Communications Act of 1934, as amended (47 U. S. C. 151 *et seq.*), appear in the appendix.

STATEMENT

This suit was instituted on February 19, 1944, by the United States of America at the request of the Federal Communications Commission pursuant to Section 401 (c) of the Communications Act (47 U. S. C. 401 (c)), against American Telephone and Telegraph Company, The Chesapeake and Potomac Telephone Company, and twenty-seven hotels doing business in the District

of Columbia, to enjoin the collection of so-called service charges or surcharges which are made by hotels against their guests when they make, or receive collect, interstate or foreign long distance telephone calls. Appellants all operate hotels in the District of Columbia. The Chesapeake and Potomac Telephone Company is an operating telephone company furnishing telephone communication service within the District of Columbia, and, jointly with the American Telephone and Telegraph Company and other connecting carriers, furnishing interstate and foreign long distance telephone communication service from the District of Columbia to many other points throughout the United States and foreign countries. Both The Chesapeake and Potomac Telephone Company and American Telephone and Telegraph Company are common carriers within the meaning of the Communications Act of 1934, and as such a common carrier each is required by Section 203 (a) of the Communications Act (47 U. S. C. 203 (a)) to file with the Commission schedules showing all charges for itself and its connecting carriers for interstate and foreign telephone communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers, and showing the classifications, practices, and regulations affecting such charges. (R. 2, 56, 64.)

Commission Proceedings.—This suit arose as a result of a proceeding instituted by the Federal Communications Commission on January 6, 1942, for the purpose of determining whether the charges collected by hotels, apartment houses, or clubs in the District of Columbia in connection with interstate and foreign telephone communication on their premises are within the jurisdiction of the Commission under the Communications Act and what tariffs, if any, should be filed with the Commission showing such charges. These charges were not shown in any tariff on file with the Commission at the time the proceeding was instituted. The Chesapeake and Potomac Telephone Company and the American Telephone and Telegraph Company were made respondents to the proceeding. The order was served on the Hotel Association of Washington, D. C., Inc.—of which all the appellant hotels are members—and the order also provided that any hotel, apartment house, or club might appear and participate in the proceeding. No hotel as such participated in the proceeding, but the Hotel Association of Washington, D. C., Inc., did participate. (R. 2–4, 12–13, 46, 62.)

At the conclusion of the proceeding the Commission on December 10, 1943, issued a report (R. 14–36) in which it found that it does have jurisdiction under the Communications Act over the surcharges collected by hotels, apartment houses

and clubs, and that if such surcharges are to be collected at all, they must be shown in tariffs on file with the Commission. On the same day the Commission also issued an order (R. 37–38) directing the two telephone companies either to file appropriate tariffs with the Commission showing all charges collected by hotels, apartment houses, and clubs in the District of Columbia in connection with interstate and foreign telephone communications, or to file an appropriate tariff regulation containing specific provisions with respect to the conditions under which interstate and foreign telephone service would be furnished to hotels, apartment houses, and clubs.

On January 22, 1944, The Chesapeake and Potomac Telephone Company filed with the Commission a new tariff provision, effective February 15, 1944, which was concurred in by American Telephone and Telegraph Company, and which reads as follows (R. 9, 38, 62–63):

> Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff.

This suit.—The complaint in the instant suit was filed on February 19, 1944. A hearing was

held on plaintiff's motion for permanent injunction. There is no substantial dispute in the evidence. It appears from the testimony that telephone service is rendered to guests in appellant hotels by means of private branch exchanges—known as PBX's—to which are connected the extension stations located in the guest rooms. The PBX board, the extension stations, and the wiring are owned and installed by The Chesapeake and Potomac Telephone Company, but the hotels pay an installation charge and regular monthly charges for the equipment. The hotels also furnish the operators who operate the PBX boards. The hotels pay the telephone company for all outside telephone calls made through the PBX whether by the management or guests. The particular charges so paid are those set forth in the applicable tariffs on file with the Public Utilities Commission of the District of Columbia for local calls and in the tariffs on file with the Federal Communications Commission for interstate and foreign long distance telephone calls. (R. 98–99, 105–108, 117–118, 126–130, 137–138, 146.)

The hotels, in turn, charge their guests for outgoing calls, or incoming collect calls, made through the PBX.[1] For local calls a charge of ten cents is made, and for long distance calls the charge is the regular toll charge specified in the tariffs of

[1] No charge is made for intra-hotel calls through the PBX.

633469—45——2

the telephone company, plus an extra charge which is called a service charge or surcharge. Each hotel has a different schedule of surcharges. In general, the amount of the surcharge varies with the amount of the tolls as set forth in the tariffs—it increases as the charges set forth in the tariffs increase—but there is no uniformity amongst the various hotels as to the amount of these added charges. In the case of the Shoreham Hotel, for example, the surcharge is 10 cents where the tariff charge plus the tax is $1.00 or less. Above that the surcharge is 10 percent of the tariff charge plus the tax with a maximum surcharge of $3.00. These rates apply on both prepaid and collect calls. A 10 cent charge is made for every long distance call which is not completed. (R. 149–155.) This suit is not concerned with the charges made for local calls, but rather with the surcharges which are made by the hotels on interstate and foreign long distance telephone calls.

As is pointed out in appellants' brief (pp. 36–39), there is also much evidence in the record concerning the many services which the hotels render to their guests in connection with the use of PBX facilities. It is the contention of the appellants that the surcharges are collected by the hotels as reimbursement for these services and that it is lawful for them to base the surcharges upon the use of interstate or foreign long distance telephone service.

The court below sustained the validity of the tariff[1] and held that it was violated by appellant hotels in collecting surcharges from their guests who make, or receive collect, interstate or foreign long distance telephone calls. An injunction was accordingly issued against the hotels. The court declined to enjoin the telephone companies. However, it retained jurisdiction over the proceedings with respect to all defendants for the purpose of issuing such further injunction orders as might be necessary to effectuate its decision. (R. 66–67, 68–69.)

SUMMARY OF ARGUMENT

1. The court below properly held that the Communications Act extends to that portion of a long distance telephone call which takes place between the PBX board in a hotel and the instrument used by the hotel guest calling or called. The definition of "wire communication" in Section 3 (a) of the Act is comprehensive, and includes all transmission between the points of origin and reception of such transmission, as well as all instrumentalities, facilities, apparatus, and services incidental thereto. Acceptance of appellants' contention would substantially frustrate effective public regulation of charges for interstate and foreign communication service, for it

[1] The court declined to pass upon the justness or reasonableness of the tariff on the ground that that question was not for judicial consideration until "after a prior determination" by the Commission. (R. 66.)

would mean that appellants and others similarly controlling access to the use of telephones would be able freely to resell telephone service to the public and impose charges thereon additional to the charges specified in the telephone companies' filed schedules. Contentions similiar to appellants' have been consistently rejected for nearly thirty years by state courts and public utility commissions.

Being charges for telephone service, appellants' surcharges are required to be included in schedules filed under Section 203 (a) of the Act, which is not limited in its application to charges which accrue to the financial benefit of the carrier. In this case the telephone companies followed a permissible alternative method of treatment, by specifying in a tariff regulation, as a condition of service, that appellants should impose no charges additional to those of the telephone companies stated in the schedules. Tariff regulations of this nature are commonplace in telephone company schedules, and fall clearly within the operation of Section 203 (a). The condition cannot be deemed invalid as an attempt to regulate the hotel business, since the surcharges in question are based not upon hotel service but upon telephone service supplied to guests.

Appellants' authorities cited from the transportation field serve only to emphasize the weight which should be given by the courts to the Com-

mission's conclusion that the Act extends to the surcharges in question.

2. The argument that the tariff regulation should be construed so as not to apply to appellants' surcharges rests on a false premise. It is not denied that the appellants render many secretarial and other services to their guests, for which they are entitled to seek reimbursement in any appropriate manner. But the surcharges in question do not rest upon such hotel services, but are direct charges on the use of telephone service as such. In any event, the language and the history of the regulation preclude any substantial argument that it is inapplicable to appellants' surcharges.

3. The injunction was properly issued under Section 411 (a) of the Act against appellants notwithstanding the court's failure also to enjoin the telephone companies. Tariff schedules filed under Section 203 (c) bind carriers and subscribers alike, and may be enforced against either regardless of violation by the other. Moreover, if a violation by the carriers is prerequisite to injunction of the subscribers, the record facts indisputably establish such a violation, in that the telephone companies continued to supply telephone service to the appellants knowing that the condition stated in their tariff regulation was not being observed. It is doubtful that the court below intended to hold that no such violation had

been shown; but if it did, the holding was plainly erroneous as a matter of law, and if deemed relevant may and should be corrected by this Court.

ARGUMENT

Appellants in their brief rely upon three principal arguments as grounds for reversal of the lower court's decision. In the first place they maintain that the tariff in question is invalid since it pertains to matters not covered by the provisions of the Communications Act and hence not within the Commission's jurisdiction. Secondly, they argue that even if the tariff is valid, the action of the hotels in collecting surcharges from their guests in no way contravenes any of the terms of the tariff. Their final contention is that in any event there is no authorization in the Communications Act for the issuance of an injunction against appellant hotels in the absence of a finding of violation by the carriers. We discuss these three arguments in the order stated.

I

THE TARIFF IN QUESTION IS VALID

Section 203 (a) of the Communications Act (47 U. S. C. 203 (a)) requires every common carrier to file with the Commission schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own

system, and between points on its own system and points on the system of its connecting carriers, and showing the classifications, practices, and regulations affecting such charges. Section 203 (c) (47 U. S. C. 203 (c)) provides that, once such schedules are filed, no carrier shall extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations or practices affecting such charges, except as specified in the schedules.

Pursuant to the above statutory requirement The Chesapeake and Potomac Telephone Company and American Telephone and Telegraph Company have filed with the Commission tariff schedules as required by the Act (R. 6–7). Among these schedules is the tariff involved in this case, which was filed on January 22, 1944, to be effective on February 15, 1944. The tariff reads as follows (R. 9, 38):

> Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff.

Appellants maintain (Br. 36–46) that this tariff is invalid because it does not relate to telephone communication within the meaning of the Communications Act, but is an attempt to regulate

their hotel business. They would apparently treat a telephone message as a commodity which is "shipped" by the telephone company as far as the PBX board and no farther; what takes place between the PBX board and the telephone used by the guest is to be regarded as hotel service and not telephone service (cf. Br. 48–55). Neither the Commission nor the telephone companies, they contend, may validly control the charges which hotels may in their business judgment choose to exact for such hotel service.

This argument, we submit, reflects an unrealistic and artificial view of a telephone conversation, and one which is completely rejected by the Communications Act. Section 3 (a) of the Act (47 U. S. C. 153 (a)) defines "wire communication"—of which telephone communication is a part—as follows:

> "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

It is difficult to imagine how a statutory definition could more clearly cover the situation involved in this case.[1] The definition comprehends within "wire communication" the transmission of all signals and sounds of any kind between the points of origin and reception of such transmission, and includes all instrumentalities, facilities, apparatus and services incidental to such transmission. No argument based upon the technical contractual relationships between the hotels and the telephone companies can obscure the plain fact that the point of origin of a telephone call is the telephone instrument which the hotel guest uses, and the point of reception is the telephone instrument used by the person to whom he talks, and vice versa. The PBX system and its operators, whether or not supplied or controlled by the hotels, are instrumentalities, facilities, apparatus and services incidental to the transmission of his message, no less than are the central exchange system, wires, instruments and services supplied and controlled by the telephone companies themselves.

[1] Significantly, the tariffs of The Chesapeake and Potomac Telephone Company and American Telephone and Telegraph Company in substance embody this definition. The tariffs read as follows (R. 209, 210):

"Message toll telephone service is that of furnishing facilities for telephone communication between telephones in different local service areas in accordance with the regulations and system of charges specified in this tariff. *The toll service charges specified in this tariff are in payment for all service furnished between the calling and called telephones.*" [Italics supplied.]

638469—45— —3

If appellants' contention to the contrary were sustained, effective regulation of interstate and foreign telephone rates would be substantially impaired. Under appellants' theory the Commission could prescribe rates on long distance calls to and from the PBX board, but neither the Commission nor any other agency charged with the regulation of telephone rates could prevent any amount of additional charges being assessed against the guest making or receiving the call. If this were permitted, it would be squarely contrary to the underlying policy of the Communications Act, for as the Commission stated in its Report (R. 26):

> If the collection of such surcharges were not subjected to regulatory control, a subscriber, or anyone else other than the telephone company, who is permitted by the telephone company to control access to the use of a telephone, could freely resell interstate and foreign telephone service, imposing any charges of his own on such use. This would mean at least a partial nullification of effective public regulation of charges for interstate and foreign communication service, for there would then be a serious hiatus in the safeguards against excessive and discriminatory charges to the using public. A hiatus of this nature would be squarely contrary to the intention evidenced in the Communications Act of 1934 that there be comprehensive regulation of charges for interstate and foreign communication service.

The contentions which appellants make here are not new. They go back at least to 1915. Consistently since that time state courts and commissions which have considered the problem of surcharges similar to those in question here have concluded that such surcharges are subject to regulation by public utility commissions as part of the regulation of public utility telephone service. *Re New York Telephone Co.*, 26 P. U. R. (N. S.) 311 (N. Y. 1938), 30 P. U. R. (N. S.) 350 (N. Y. 1939); *People ex rel. Public Service Commission* v. *New York Telephone Co.*, 262 App. Div. 440 (1941), affirmed without opinion, 287 N. Y. 803; *Hotel Pfister* v. *Wisconsin Telephone Co.*, P. U. R. 1932 B, 8, P. U. R. 1933 C, 479 (Wis.); *Hotel Pfister, Inc.*, v. *Wisconsin Telephone Co.*, 203 Wis. 20 (1930); *Jefferson Hotel Co.* v. *Southwestern Bell Telephone Co.*, 15 P. U. R. (N. S.) 265 (Mo. 1936); *Re Hotel Marion Co.*, P. U. R. 1920 D, 486 (Ark. 1920); *Connolly* v. *Burleson*, P. U. R. 1920 C, 243 (N. Y. 1920); *Re Hotel Telephone Service and Rates*, P. U. R. 1919 A, 190 (Mass. 1918); *Hotel Sherman Co.* v. *Chicago Telephone Co.*, P. U. R. 1915 F, 776 (Ill. 1915).[4]

[4] In related fields of gas and electricity distribution, the courts and commissions have also sustained tariff regulations prescribing the conditions under which gas and electricity are furnished to consumers. The problem involved in these fields is concerned with remetering. Apartment houses, commer-

We submit, therefore, that there is no merit in the contention that the charges dealt with by the tariff in question are charges for hotel service and not for telephone service, and that the tariff is for that reason invalid in so far as it prohibits such charges. But appellants argue, as an alternative, that even if the charges are for telephone services, they are not charges of the carrier "for itself and its connecting carriers", as contemplated and required by Section 203 (a) of the Act, and therefore are not properly part of a tariff filed under that section, and cannot bind anyone. It may be conceded that the "surcharges" imposed by the hotels are not charges "for" the carrier, in the sense of being paid over to or received by the carrier, and there is no con-

cial buildings, etc., have from time to time attempted to buy gas or electricity at wholesale rates and retail it to their tenants by remetering it. The gas and electricity companies have combatted this by adopting tariffs forbidding remetering. In other words, they have furnished service to the building owners on condition that the gas or electricity should not be resold. Tariffs of this type have uniformly been upheld by the courts and commissions which have considered the problem. *Lewis* v. *Potomac Electric Power Co.*, 64 F. 2d 701 (App. D. C.); *Karrick* v. *Potomac Electric Power Co.*, P. U. R. 1932 C, 40 (D. C. Sup. Ct. 1931); *Florida Power & Light Co.* v. *State*, 107 Fla. 317 (1932); *Sixty-Seven South Munn* v. *Board of Public Utility Commissioners and Public Service Electric & Gas Co.*, 106 N. J. Law 45 (Sup. Ct. 1929), affirmed, 107 N. J. Law 386 (Court of Errors and Appeals 1930), certiorari denied, 283 U. S. 828; *Public Service Commission* v. *J. & J. Rogers Co.*, 184 App. Div. 705 (N. Y. 1918); *People* v. *Public Service Commission*, 191 App. Div. 237 (N. Y. 1920), affirmed, 230 N. Y. 574 (1920).

tention made here that the hotels are "connecting carriers."[8] But the surcharges are, as we have shown, charges for telephone service supplied by a carrier, and they are imposed on the use of that service with the knowledge and acquiescence of the carrier. To exclude such charges from the operation of Section 203 (a) merely because they accrue financially to the hotels rather than the carrier requires an unnecessarily pedantic and, we believe, unsound reading of the section. The Communications Act was, in the language of the Commission's Report (R. 26), designed to afford "safeguards against excessive and discriminatory charges to the using public," and unless its language compels otherwise it should be construed to that end. The words "for itself" in Section 203 (a) are not, we submit, so precise and inelastic as to confine the operation of the section within limits set by technical doctrines of agency; their function in their context is, rather, to specify the services in respect of which charges must be included in filed schedules. In other words, the section requires the inclusion in a carrier's schedules of all charges for such carrier's service and the service of its connecting carriers, whether ex-

[8] Neither the Commission in its Report and Order of December 10, 1943 (R. 14, 37), nor the court below in this suit, made any finding on the question whether the hotels are "connecting carriers" within the meaning of the Act, and we have made, and make, no contention to that effect in this suit. Appellants' argument (Br. 32–35) that they are not "connecting carriers" is therefore beside the point.

acted by the carrier itself or by others with its knowledge and acquiescence. The charges for telephone service imposed by the hotels in this case fall within the section regardless of whether the hotels in imposing the charges do so for their own benefit or as agents for the carriers.

Moreover, it should be recalled that the schedules required by Section 203 (a) must reflect not only charges for telephone service, but also "the classifications, practices, and regulations affecting such charges." Even if the phrase "all charges for itself" is given the restrictive construction suggested by the appellants, that construction cannot avail them here. For the schedule in question is one which plainly relates to the telephone companies' own charges. The portion of the schedule the validity of which is here challenged is a regulation specifically affecting the telephone companies' own service which they supply to the hotels. It is the telephone companies' service that is supplied, and the telephone companies' charges that are fixed, upon the condition that hotel subscribers shall make no additional charges upon the use of the service by guests. Such regulations, defining the rights, privileges, and restrictions attaching to a particular type of service offered, are a commonplace of telephone tariffs (see, e. g., R. 219–222), and form as proper a part of the tariff as does the schedule of charges itself. A regulation prohibiting hotels from making surcharges for telephone messages

from instruments "accessible to the general public or to guests, tenants or members generally" has been a part of the filed tariff of The Chesapeake and Potomac Telephone Company for more than 25 years (R. 21, 222). Such regulations, including the regulation here challenged, fall squarely within Section 203 (a), however strictly that section be construed.

Recognizing that binding conditions upon the use of telephone service supplied by a carrier may be included in a schedule filed under Section 203 (a), the appellants seek to avoid this particular condition on the ground (Br. 46–55) that it purports "to regulate the charges of other persons wholly without the jurisdiction of the regulatory body." The condition, appellants suggest, should be held judicially unenforceable because it falls among those "obviously invalid" regulations "which affect, not the carrier in its business, but only the subscriber in its business" (Br. 48–49).

The regulation does affect the subscriber in the sense that it prevents the subscriber from imposing for its own benefit a charge for the use of a regulated public service. But the impropriety of such an impact is not to be established by generalizations, nor by hypothetical instances of regulations designed to affect business practices unrelated to the use of telephone service. Appellants suggest (Br. 49) that if this regulation is held valid the telephone companies would be enabled to deny service to a department store

whose sales practices they disapproved, or to a law office whose fees they deemed excessive. At the same time appellants concede (Br. 48) that a regulation might be proper which had for its purpose the prevention of abuse of the carrier's service and facilities. That, we submit, is a purpose of the regulation here under review. There is here no effort to control hotel business, even to the extent of preventing the hotels from recovering such expenses, secretarial or otherwise, as they may incur in making available to their guests the telephone companies' interstate and foreign telephone service. Such expenses may be recovered in any lawful manner which appeals to the business judgment of the hotels' managers. Whether the recovery is by means of increased room rates, by flat service charges on each guest, by fixed fees for each service rendered, are matters beyond the reach of the regulation and beyond the concern of the Commission. The thrust of the regulation is merely at the practice whereby the hotels, in the guise of reimbursing themselves for hotel services, in fact subject the use of interstate and foreign telephone service to charges not contained in the published effective tariffs for such service.

The cases cited by appellants (e. g., Br. 42–44, 53–54) involve factual problems far different from any presented here, and are helpful neither by authority nor by analogy. While procedurally the regulation of railroad rates by the Interstate

Commerce Commission bears many resemblances to the regulation of interstate and foreign telephone communication rates by the Federal Communications Commission, there is obviously no such identity in the conditions and problems of the two industries as to call for the indiscriminate application of decisions in one field to cases arising in the other. Moreover, in each of the decisions of this Court relied on by the appellants as especially pertinent (e. g., *Acme Fast Freight* v. *United States,* 30 F. Supp. 968 (S. D. N. Y.), affirmed *per curiam,* 309 U. S. 638 (freight forwarders not engaged in operations on a public highway); *United States* v. *Am. Tin Plate Co.,* 301 U. S. 402 (spotting of cars on industrial plant tracks); *Swift & Co.* v. *United States,* 316 U. S. 216 (yard services by stockyards companies following unloading of livestock at delivery pens)) the question arose upon a determination of the Interstate Commerce Commission that the particular activity involved did not constitute transportation within its jurisdiction, and the action of that Commission in so determining was upheld as a determination of fact supported by the record before it. The deference shown by this Court to such prior factual determinations by the Interstate Commerce Commission within its area of special competence furnishes no argument for disregarding in this case the comparable factual determination of the Federal Communications Commission in its specialized sphere. Following

a comprehensive investigation authorized by the Act the Communications Commission has concluded that service between the PBX board and the telephone instrument used by the person calling or called is an integral part of interstate and foreign telephone communication covered by the Act, and that charges relating to that part of the communication are therefore properly to be included in schedules filed under Section 203 (a). No authority is cited by appellants which would either require or support rejection of this conclusion.

II

THE TARIFF IN QUESTION APPLIES TO APPELLANTS' SURCHARGES

Although for the most part assuming that the tariff in question, if valid, applies to their surcharges (see Br. 32), appellants argue in Point VI of their brief (Br. 61–63) that a proper construction of the tariff would in any event, on the evidence in this case, exclude their charges from its operation. In particular, it is suggested that the tariff, if construed to prohibit their surcharges, amounts to a regulation of charges for hotel service, and that the invalidity of such a regulation is so patent as to dictate judicial selection of some alternative meaning for the tariff in order to save it.

The premise of this argument assumes the major point at issue in the case. Certainly, the record shows that the hotels render services, secretarial and otherwise, in connection with interstate and foreign telephone communication by their guests. But it does not follow that a prohibition of the surcharges involved here is an effort to regulate hotel services. Whatever may be the cost of the hotel services rendered, the surcharge is placed directly on the use, not of hotel service, but of telephone service. There is no dispute in the evidence that the surcharge is collected when interstate and foreign telephone service is used, and only when such service is used. There is likewise no dispute that the surcharge is collected whether or not the guest needs or uses any of the hotel services offered, and that the amount of the surcharge is controlled not by the amount or cost of hotel service involved but by the tariff charge, plus federal taxes, for the telephone service. The surcharges bear no relation whatsoever, in either amount or incidence, to the furnishing of secretarial or other hotel service. They are direct charges on the use of telephone service as such, and cannot be exculpated merely by assertion, or proof, that business judgment finds such charges appropriate as a means of reimbursement for hotel service expenses incurred for the convenience of guests. The suggestion (Br. 62) that on the Commission's theory a hotel could not charge for a hotel room having a telephone in it is a *reductio ad absurdum*.

Moreover, even if there were merit in appellants' claim that the regulation invades the prov-

ince of hotel management, we submit that the regulation cannot in any event be saved by construction. It must stand or fall as what it is—a provision expressly drawn to prohibit the very surcharges involved here. We see no ambiguity in the regulation as applied to the record facts, but if there were ambiguity it would be resolved by reference to the regulation's genesis. The Commission after investigation ordered the telephone companies either to show the hotels' surcharges in their tariff schedules, or to specify the conditions upon which telephone service was furnished to the hotels. The telephone companies followed the latter course, and conditioned the furnishing of telephone service upon abolition of the surcharges. The reasonableness of the condition may be—as it is being (see App. Br. 13)—contested in other appropriate proceedings; its validity may be—as it is being—contested here; but its meaning, in the light of its background, is not subject to serious controversy.

III

THE COURT BELOW PROPERLY ISSUED AN INJUNCTION AGAINST APPELLANT HOTELS

This action was instituted under Section 411 (a) of the Communications Act, which reads as follows:

> In any proceeding for the enforcement of the provisions of this Act, whether such proceeding be instituted before the Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

The appellants concede that they are "interested in or affected by the charge, regulation, or practice under consideration," and therefore that it was "lawful to include [them] as parties in this proceeding" (Br. 63). However, they point to the fact that Section 203 (c) of the Act prohibits only *carriers* from making charges or extending privileges inconsistent with published tariffs, and to the further fact that sanctions under Section 203 (e) for failure to comply with Section 203 (c) run only against *carriers;* and from these sections they deduce that they, being (as they contend) neither connecting carriers nor agents of carriers, are not subject to injunction under Section 411 (a) except upon a finding of violation by the carrier.*

* It is not entirely clear whether appellants go even farther, and contend that the actual issuance of an injunction against the carrier is a prerequisite to relief against parties other than the carrier. While their argument (Br. 63–64) is in general directed to the point that no decree could properly

No contention is made in this case that appellants are "connecting carriers" within the meaning of the Act;[7] and we accept for present purposes the finding of the court below (R. 63) that in extending interstate and foreign telephone service to their guests they are not acting as the agents of the telephone companies.[8] But it by no

be entered against them in the absence of a *violation* by the telephone companies, they state (Br. 64) that the purpose of Section 411 (a) is "to afford complete assurance against repetition or continuance [of a violation by a carrier] by enjoining the carrier and also enjoining the subscribers or other parties involved"; and in their Summary of Argument (Br. 24) they assert that no decree may be entered against parties other than carriers "except to the extent that a decree is entered against the carriers." We dispose of this suggested construction of the Act, *infra*, pp. 31–33.

[7] See footnote 5, *supra*. Neither the Commission nor the court below made any finding that appellants were either carriers or connecting carriers. Appellants argue (Br. 35) that even if they were connecting carriers the tariff would be unenforceable against them without their consent. In so arguing, they overlook the fact that under Section 203 (c) it would be unlawful for them, as carriers, to participate in communication unless schedules had first been filed and published in accordance with the Act. If, as connecting carriers, they declined to accept the telephone companies' schedules, their surcharges would still be unlawful in the absence of schedules filed by them or on their behalf.

[8] The Commission in its Report found the hotels to be agents of the telephone companies (R. 29–30). However, appellants are in error in asserting (Br. 11) that the Commission "had based its decision upon its finding that the hotels were the agents of the telephone company and for this reason had ruled" that the surcharges were unlawful unless covered by schedules. The Commission explicitly placed its decision upon alternative grounds, saying (R. 30):

"* * * although the Commission has found and concluded that the hotels, apartment houses, and clubs are agents of respondents, the Commission is also of the opinion that a permissible alternative means of regulation of this matter is a tariff regulation specifying proper conditions upon which service is provided by respondents to hotels, apartment houses, and clubs. *Regardless of the agency relationship found to exist*, each hotel, apartment house, and club receives P. B. X. service as a subscriber, and as such, it can receive the service only subject to such proper tariff conditions as are attached." [Italics supplied.]

means follows from these propositions that upon the proved facts appellants were not properly subject to injunction.

In the first place, we do not accept the assumption that injunctions may be issued under Section 411 (a) against others than carriers only when necessary to aid in the enforcement of the Act against carriers as such. Though Section 203 (c) speaks in terms only of carriers, we do not believe that it was intended to supersede the general principle of rate regulation that once a valid tariff is filed it has the force and effect of law, and must be complied with by both carrier and customer until changed or set aside. *United States* v. *Wabash R. Co.*, 321 U. S. 403; *Crancer* v. *Lowden*, 315 U. S. 631; *Lowden* v. *Simonds etc. Grain Co.*, 306 U. S. 516; *Director General* v. *Viscose Company*, 254 U. S. 498; *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Robinson* v. *Baltimore & Ohio R. Co.*, 222 U. S. 506. In the light of this principle, Section 411 (a) may, we believe, be taken as supplementing Section 203 (c) to the extent of authorizing judicial action to

bring about compliance with a filed tariff by all persons "interested in or affected" thereby, whether or not they are, or are acting for, carriers upon whom the express obligations of Section 203 (c) are placed. For the purposes of this phase of the argument we assume, as do appellants, that the tariff regulation under review is valid as applied to appellants' surcharges. If it is, then it would seem that Section 411 (a) authorizes injunctive process against the appellants as subscribers to enforce compliance on their part with the tariff, regardless of any showing of failure of compliance upon the part of the carriers themselves.

But we do not need to, and do not, rest upon this construction of Section 411 (a). The record, we believe, establishes beyond possibility of doubt that the telephone companies themselves were engaged in a violation of their own schedule, and of the Act, and would have been subject to injunction had the court below, in its equitable discretion, seen fit to enjoin them. Their schedule—the validity of which they affirmatively supported (see R. 200)—provided expressly that message toll service was supplied to hotels "upon the condition that use of the service by guests * * * shall not be made subject to any charge by any hotel * * * in addition to the message toll charges of the Telephone Company" (R. 282). They were fully cognizant that the hotels, notwithstanding this condition, were continuing to

exact surcharges from their guests upon the use of interstate and foreign telephone service (R. 52). Nevertheless, they continued to supply telephone service in violation of the condition of their own schedule. Conditions in a tariff schedule respecting the quantum or type of service furnished to subscribers are as binding upon the carriers as are the tariff charges themselves. *United States* v. *Wabash R. Co.*, 321 U. S. 403; *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402; *Goodman Lumber Co.* v. *United States*, 301 U. S. 669; *A. O. Smith Corp.* v. *United States*, 301 U. S. 669; *United States* v. *Pan American Corp.*, 304 U. S. 156.[9] Section 411 (a) of the Act, like Section 2 of the Elkins Act[10] from which it was drawn without material change, by its language plainly contemplates proceedings for the enforcement of "regulations" and "practices" as well as charges.

It is true that no injunction was in fact issued against the telephone companies. But under even the strictest construction of Section 411 (a) the right of a court to enjoin other interested parties from violation of the Act is not conditioned upon the actual issuance of an injunction against the car-

[9] The court below expressly found (R. 66): "This tariff regulation is binding both on defendant telephone companies and on each of the defendant hotel companies."

[10] 32 Stat. 848; 49 U. S. C. 42. For the purpose of the provision as placed in the Elkins Act, see H. Rep. No. 3765, 57th Cong., 2d Sess., pp. 5–6, reporting favorably S. 7053, 57th Cong., 2d Sess.

rier." Section 411 (a) authorizes the making of orders and decrees against additional parties "in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers"—not merely to the same extent as such orders or decrees *are* issued against carriers. On this record we believe it clear that an injunction against the carriers was "authorized by law", and could properly have been issued by the court below, as was done in the similar case of *United States* v. *Hotel Astor, Inc.* (S. D. N. Y., decided August 31, 1944; Statement as to Jurisdiction pending in this Court, No. 823, this Term). Equally clearly it was within the discretion of the court below to decline, as it did, to issue an injunction against the telephone companies (see *Hecht Co.* v. *Bowles,* 321 U. S. 321); for the true controversy was between the United States and the hotels, and an injunction against the telephone companies would have added nothing if the process of the court were obeyed by the hotels. This was recognized by the United States at the trial, and the request for an injunction against the telephone companies was not strongly pressed."[11] But whether or not such

[11] As stated above (footnote 6), it is not entirely clear whether appellants dispute this proposition.

[12] See statement of counsel for the United States (R. 206): "An injunction against the hotels, which retained jurisdiction against the telephone companies in case it became necessary to issue an injunction against them to enforce your order, would be all right so far as we are concerned."

an injunction was in fact issued is immaterial so long as such an injunction, on the basis of the record, would have been authorized by law. The record, we submit, establishes that such an injunction would have been authorized by law.

Appellants stress the fact that the court below not only failed to issue an injunction against the telephone companies, but also found as a fact that those companies were not violating the Act. We question that this is an accurate analysis of the judge's opinion and findings. True, the court in its conclusions of law stated (R. 66) that the "telephone companies are not violating said tariff regulation by any act or omission of their own, and are not responsible for the violations being committed by the hotels." This, however, may mean no more than that the court, like the Government, regarded the hotels rather than the telephone companies as the primary, active violators, and the ones against whom an injunction should issue in the first instance. Such a construction is consistent with the court's statement in its oral opinion (R. 54) that "it could enjoin these telephone companies if the facts of the case required", and with the court's retention of jurisdiction over the proceeding "so that if any of the defendant hotels make charges in violation of the foregoing injunction the Court may enjoin the defendant telephone companies from rendering interstate and foreign message toll service to such

hotels" (R. 67). We believe that the court's findings and conclusions, read as a whole, mean no more than that the telephone companies were engaged in no such violation of the Act as would call upon the court, as a court of equity, to enjoin them in the absence of further developments.

If we are wrong in our construction of the court's findings and conclusions, the appellants' contention must, we believe, still fail. For assuming the validity of the tariff regulation (an assumption made by both sides for purposes of this point of the argument), a finding that the telephone companies were not violating the regulation is, on the undisputed facts, a plain error of law which may and should be corrected by this Court. The regulation stated a condition of service; the condition, to the knowledge of the telephone companies, was not complied with; nevertheless the telephone companies continued to supply service. The violation is, we believe, unquestionable as a matter of law, and if the court below is deemed to have held to the contrary, its error may and should be corrected by this Court. That the United States took no appeal is of no significance; correction of the error is sought, not as a basis for injunction against the telephone companies—which was denied without objection by the United States (R. 206; see footnote 12, *supra*)—but as a basis for sustaining the injunction against the hotels, which was granted. Error

in the findings or conclusions of the court below of course afforded the United States no ground for appeal from the judgment in its favor (*Lindheimer* v. *Illinois Tel. Co.*, 292 U. S. 151; *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645; *Public Serv. Comm'n* v. *Brashear Lines*, 306 U. S. 204; *Flournoy* v. *Wiener*, 321 U. S. 253); and if the judgment below is proper on correct principles it may stand regardless of any erroneous conclusion of law by the court. *Helvering* v. *Gowran*, 302 U. S. 238; *Helvering* v. *Pfeiffer*, 302 U. S. 247; *Riley Co.* v. *Commissioner*, 311 U. S. 55; cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 88.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
CHESTER T. LANE,
Special Assistant to the Attorney General.
CHARLES R. DENNY,
General Counsel
HARRY M. PLOTKIN,
Assistant General Counsel
JOSEPH M. KITTNER,
Counsel,
Federal Communications Commission

MARCH 1945

APPENDIX

The pertinent provisions of the Communications Act of 1934 are as follows:

SEC. 3 (a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

SEC. 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such

public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the pro-

visions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

Sec. 401. (c) Upon the request of the Commission it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

(d) The provisions of the Expediting Act, approved February 11, 1903, as amended, and of section 238 (1) of the Judicial Code, as amended, shall be held to apply to any suit in equity arising under Title II of this Act, wherein the United States is complainant.

SEC. 411. (a) In any proceeding for the enforcement of the provisions of this Act, whether such proceeding be instituted before the Commission or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

U. S. GOVERNMENT PRINTING OFFICE: 1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 446

AMBASSADOR, INC., WASHINGTON-ANNAPOLIS HOTEL COMPANY, DAVID A. BAER and ROBERT O. SCHOLZ, a Partnership, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*

APPELLANTS' PETITION FOR REHEARING

PARKER MCCOLLESTER,
GEORGE DEFOREST LORD,
JOSEPH W. WYATT,
Counsel for Petitioners.

visions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

Sec. 401. (c) Upon the request of the Commission it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

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FILE COPY

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APPELLANTS' PETITION FOR REHEARING

Come now the above-named petitioners and present this their petition for a rehearing of the above-entitled cause, and in support thereof, respectfully show:

The case was argued on March 9 and 12, 1945. The opinion of this Court on which the rehearing is requested was written by Mr. Justice JACKSON and handed down on May 21, 1945. Mr. Justice BLACK and Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

As grounds for the rehearing sought, petitioners allege: (1) that this Court incorrectly rested its conclusions upon the provisions of Sections 201 and 202 of the Communications Act of 1934, as amended, whereas this proceeding was instituted at the request of the Federal Communications Commission, and at its election, solely under the provisions of Section 203 of said Act and was brought to enjoin an alleged violation of that section only (R. 4, 8); (2) the Court

failed to give proper effect to the language of Section 203; and (3) the Court failed to decide questions whose determination is essential.

It was alleged by the Commission and decided by the court below that the petitioners were guilty of a violation of Section 203 in failing to discontinue service charges to their guests in conformity with a tariff provision filed by the telephone companies, reading as follows:

> "Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club, in addition to the message toll charges of the Telephone Company as set forth in this tariff."

The Court Quoted and Applied the Wrong Section of the Act

The Court's opinion seems to proceed from the impression, stated on page 6* of the opinion, that the position of the hotel appellants rests upon the claim "that the regulation in question is unlawful because it is unreasonable." It is perhaps this impression which caused the Court to rest its opinion upon the provisions of Sections 201 and 202, which require that the charges, practices, classifications, regulations, facilities or services of common carrier wire communication carriers shall be just, reasonable and non-discriminatory. This in turn has probably led the Court to its conclusion that the hotels must seek their relief from the regulation by complaint to the Commission.

The contentions of the hotel appellants in so far as this suit is concerned do not, however, rest upon the claim that the regulation is unreasonable. Whether reasonable or unreasonable, it is submitted that the regulation is not one which by Section 203 is to be published in a tariff filed with

* All references to the opinion are to the page of the pamphlet opinion.

the Commission, and non-observance of which constitutes a violation of the very precise and rather limited provisions of that Section.

The provisions of Section 203 deal only with the filing of and compliance with tariffs. It is the only section of the Act which contains any reference as to the type of tariffs which may be filed with the Commission or the type of classifications, practices or regulations which such *filed* tariffs may contain.

More specifically Section 203(a) requires filing with the Commission by a common carrier of

> "schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication * * * and showing the classifications, practices, *and regulations affecting such charges.*" (Italics ours.)

Section 203(b) provides that no change shall be made in the "charges, classifications, regulations or practices which have been so filed" except under certain circumstances; and Section 203(c) provides that no carrier shall engage in such communication unless the schedules have been filed, and that no carrier shall

> "employ or enforce any classifications, regulations, or practices *affecting such charges*, except as specified in such schedule." (Italics ours.)

It therefore appears clearly that as far as classifications, practices and regulations are concerned, the entire section under which this suit is brought relates only to those classifications, practices and regulations "affecting such charges", *i. e.*, the charges of the common carriers who were appellees here.

Appellant hotels argued that the prohibition against service charges in the tariff quoted above did not *affect* the carriers' charges. Although this appeared to be the most important issue in the case, the opinion made no attempt to interpret the phrase "affecting such charges" and made no finding as to whether the prohibition

against service charges by the hotel appellants in the telephone companies' tariff fell within the scope of the phrase last quoted. Probably for the reasons previously stated, it assumed that the Commission's powers relating to this suit under Section 203 were to be determined by reference to, and were co-extensive with the authority under the provisions of Sections 201(b) and 202, which, however, employ quite different and much broader language. This conclusion of the Court will be found on page 5 of the opinion. It there states:

> "The supervisory power of the Commission is not limited to rates and to services, but the formula oft repeated in the Act to describe the Commission's range of power over the regulated companies is 'charges, practices, classifications, and regulations *for and in connection with such communication service.*'" (Italics ours.)

Although the language last quoted is referred to as "a formula oft repeated", it does not once appear in the provisions of Section 203, under which this suit is brought.

The provisions of Sections 201 and 202 require briefly—201(b), that all charges, classifications, practices and regulations shall be just and reasonable; and 202(a), that it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, etc., "for or in connection with like communication service". The phrase "for and in connection with such communication service" (Section 201) and the similar phrase in Section 202 are much broader in scope than the phrase in Section 203(a) and (c) "affecting such charges". Almost any regulation relating to supplying telephone service would be "for and in connection with such communication service"; whereas, not every such regulation would be one "affecting such charges".

The opinion of the Court, at page 5, after referring to the provisions of Section 201(b) of the Communications Act, providing that

> "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable,"

says

> "All of these must be filed with the Commission in the form it prescribes,"

referring to Section 203 of the Act. As a matter of fact, Section 203 of the Act does not provide that *all* charges, classifications, practices and regulations shall be filed with the Commission, but only that charges *of the carriers* and classifications, practices and regulations affecting *such charges* must be so filed. Indeed, there are many practices and regulations made in connection with charges of carriers which, although they fall under the requirement of reasonableness, are not required to be filed as a part of a tariff. As an example of the kind of practices and regulations that are not filed as a part of a tariff, the Court's attention is directed to Telephone Company Exhibit No. 6 (R. 284) (the form of contract for service offered by the telephone companies to hotels) which was not a part of the tariff, but which plainly falls within the requirement of justness and reasonableness in respect of its provisions.

The Issue is Not One of Reasonableness

There is no provision in Section 203 which relates in any way to the reasonableness or unreasonableness of the tariff sought to be enforced. The section includes only regulations which affect the charges of the telephone carrier. By basing its conception of the Commission's authority to bring this suit on Sections 201 and 202, the Court fell into the error of concluding that the question before it was one of reasonableness rather than jurisdiction to enforce the Act under Section 203. The hotel appellants in this Court contended that the tariff provision was invalid because it was not a regulation affecting the carriers' charges required to be filed under Section 203 of the Act, departure from

which could become the basis of a suit for enforcement under that section and Section 401(c) of the Act.

The Restriction Against Service Charges Does Not "Affect" the Carriers' Charges

Since the Court based its conception of the Commission's powers on a section not in issue in this suit, it also arrived at the further erroneous conclusion that it was of no consequence whether the hotels were agents or subscribers or whether the relationship fitted into some common law category. Since Section 203 relates solely to the charges of the carriers and the classifications, practices and regulations affecting such charges (*i. e.*, the carriers' charges), the hotels' charges could only become the subject of scrutiny if they were made by the hotels as agents for the carriers and consequently became the carriers' charges. The determination whether the hotels were agents or subscribers of the telephone companies did not, therefore, involve merely an "attempt to fit the regulated relationship into some common-law category" (Opinion, p. 7). Upon this determination depended whether or not the regulation *affected* the charges of a carrier for wire communication service and therefore came within Section 203.

The question of whether the restriction against service charges by the hotels is one "affecting" the carriers' charges is dealt with in the briefs filed by the hotels (Appellants' brief, pp. 46, *et seq.;* Appellants' reply brief, pp. 11, 12, 13) and requires no further elaboration here. The telephone companies argued (brief, pp. 6 and 7) that

> "The regulation which prohibits hotels from imposing surcharges on toll calls made by guests is a proper element in the description of the service *because it is a limitation on the use that may be made of the service.*" (Italics ours.)

Consequently, they argued, the prohibition in question is a regulation "affecting" the charges of the telephone companies. This argument leads inevitably to the conclusion that if the former service were reduced by the limitation, the toll rates should also be reduced. The record is barren of any evidence that the limitation against surcharges in the tariff resulted in any variation of the rate at all. This argument of the telephone companies that the limitation against service charges shows the value of the service rendered would, in effect, read into the Communications Act the language used in the Interstate Commerce Act. Section 6 of the Interstate Commerce Act provides that schedules filed by common carriers shall state separately any terminal charges, etc., which affect "the value of the service rendered". The absence of such language in the Communications Act shows plainly that Congress intended that schedules required to be filed under Section 203 and enforceable thereunder should deal only with the *charges* of carriers and with classifications, regulations or practices *affecting such charges.*

The Court Failed to Decide Questions Whose Determination is Essential

One of the principal issues in the case was whether the service supplied by the hotels between the PBX boards and the rooms was "wire communication" as defined under Section 3(a) of the Communications Act (47 U. S. C. 153(a)). The Commission argued that such communication was "wire communication". (Brief for United States, pp. 14, 15.) Counsel for the telephone companies on the argument in this Court took the position that such service was not "wire communication" (Stenographic Minutes of Argument, p. 65), which is in accord with the position taken by the hotels. (Appellants' Reply Brief, pp. 4, 5.)

If, despite the foregoing considerations, the tariff regulation is held to be one within the purview of Section 203, there would remain, as the Court has held, the question of its reasonableness which would be an appropriate subject for further proceedings before the Commission. In such proceedings the issue will arise whether or not the service

between the PBX board and the rooms is "wire communication". If it is "wire communication" the cost will have to be borne by the telephone companies. If it is not, the cost will fall on the hotels. Until this issue is decided, further proceedings before the Commission will be futile. If reargument is granted, it would seem that this Court should also decide this important issue.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of this Court be, upon further consideration, reversed.

Respectfully submitted,

PARKER MCCOLLESTER,
GEORGE DEFOREST LORD,
JOSEPH W. WYATT,
Counsel for Petitioners.

Certificate of Counsel

I, PARKER MCCOLLESTER, counsel for the above named appellants, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

PARKER MCCOLLESTER,
Counsel for Petitioners

June 14, 1945

APPENDIX

Pertinent Provisions of the Communications Act of 1934

(June 19, 1934, 48 Stat. 1064 ff., 47 U. S. C. §§ 151 ff.)

SECTION 201:

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful:

SECTION 202:

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

SECTION 203:

(a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall

designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points

named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

SUPREME COURT OF THE UNITED STATES.

No. 446.—October Term, 1944.

Ambassador, Inc., Washington-Annapolis Hotel Company, David A. Baer and Robert O. Scholz, a Partnership, et al., Appellants, *vs.* The United States of America, American Telephone & Telegraph Company, et al.	Appeal from the District Court of the United States for the District of Columbia.

[May 21, 1945.]

Mr. Justice Jackson delivered the opinion of the Court.

This action was instituted at request of the Federal Communications Commission in the District Court of the United States for the District of Columbia. The Chesapeake & Potómac Telephone Co., which is engaged in rendering telephone service in the District of Columbia, and the American Telephone and Telegraph Co. were made defendants, as also were the appellants, comprising the proprietors of twenty-seven hotels in the District of Columbia. The complaint asks and the court below has granted an injunction which forbids the hotels to make charges against their guests in connection with any interstate or foreign message toll service to or from their premises, other than the toll charges of the telephone companies and applicable federal taxes. The prohibition is based on a provision to that effect in the tariff filed by the telephone companies. Upon the trial, evidence was limited by stipulation to the facts about the Shoreham Hotel, accepted as typical of all defendants.

Telephone service is available to patrons of the hotel without a charge by the hotel. In or near the lobbies, telephone booths have direct connection with telephone company central offices. Calls can there be made without involving the services of the hotel personnel and at the usual tariff rates of the telephone company paid through its coin boxes.

However, modern hotel standards require that telephone service also be made available in the rooms. Equipment for this purpose

is specified by the hotel but is installed and owned by the telephone company. The hotel pays a monthly charge for its use, and its operation is at the hotel's expense. The operating cost is substantial, rentals of the Shoreham in 1943 being $8,680.10 and payrolls for operation amounting to $21,895.62.

Typical equipment consists of a private branch exchange, known as a PBX board, connected with a number of outside or trunk lines and also with extension lines to each serviced room, and other items. This equipment permits calls for various kinds of room service, communication between guests, and calls from station to station within the hotel for which no use of other lines of the telephone company is necessary. The same switchboard and its hotel-employed operators also handle both incoming and outgoing calls for guests, including many long distance messages.

So far as the telephone company is concerned, the toll message coming to its central office from the hotel switchboard is handled much as a similar message from a residence or business station. Within the hotel, however, room telephone service necessitates additional labor as well as use of the equipment. When a call is made from the station in a room, it is placed with the switchboard operator employed by the hotel, and she in turn places the call with the telephone company's long distance operator. It is customary also to render services described as secretarial. Incoming messages may be received during the guest's absence and memoranda of them are made for and delivered to him. Outgoing messages may be transmitted for the guest. Information as to his whereabouts may be left with the operator for communication to callers; he may arrange to be reached at other locations than his room; he may arrange to have telephone service suspended for a period; incoming calls may be limited to those from designated persons, and various other services helpful to comfortable living are supplied by those in charge of the interior telephone system.

Each long distance call placed through the hotel's switchboard is charged by the telephone company to the hotel, not to the guest. The hotel pays the charge and is reimbursed, less credit losses, by collections from the guest. The reimbursement item is separately stated on the guest's bill and is not itself involved in this controversy.

The hotel also seeks to recoup the cost of its service, including equipment rentals, and perhaps some margin of profit, by a service charge to the guests who make long distance calls from their rooms. This charge varies in different hotels but this typical case shows charges of ten cents for toll calls where the telephone tariff is one dollar or less, ten percent of the telephone tariff where the charge is more than one dollar, with a maximum of three dollars per call. This service charge appears on the guest's bill as a separate item, but is stated, like the reimbursement charge as "Long distance", abbreviated to "LDIST".

In January 1942, a proceeding was instituted by the Federal Communications Commission for the purpose of determining whether the charges collected by hotels, apartment houses and clubs in the District of Columbia in connection with interstate and foreign telephone communication were subject to the jurisdiction of the Commission under the Communications Act and what tariffs, if any, should be filed with the Commission showing such charges. No such tariffs were on file with the Commission at the time the proceeding was instituted.

The Commission, December 10, 1943, found that it does have jurisdiction under the Communications Act over the charges collected by hotels and others and ruled that, if such charges are to be collected at all, they must be shown on tariffs on file with the Commission. It thought that the hotel should be regarded as the agent of the telephone companies. It issued an order directing the two telephone companies either to file appropriate tariffs showing charges collected by the hotels in connection with interstate and foreign telephone communications or to file an appropriate tariff regulation containing a specific provision with respect to conditions under which such interstate and foreign service would be furnished to hotels, apartment houses and clubs.

Confronted with these alternatives, The Chesapeake & Potomac Telephone Company filed a tariff provision in which the American Telephone & Telegraph Company concurred, which reads as follows:

'Message toll telephone service is furnished to hotels, apartment houses and clubs upon the condition that use of the service by guests, tenants, members or others shall not be made subject to any charge by any hotel, apartment house or club in addition to the message toll charges of the Telephone Company as set forth in this tariff.'

This tariff provision became effective by its terms February 15, 1944. Four days later, this suit was instituted to enjoin the hotels from collecting charges made in violation of the tariff provision, and to enjoin the telephone companies from furnishing such service to these hotels or others which continued to make charges.

The District Court sustained the validity of the tariff.[1] It regarded the hotels as subscribers rather than as agents of the telephone companies. It held that the tariff was violated by collection of surcharges from guests who make interstate or foreign long distance telephone calls or receive such calls "collect". The court did not pass upon the justness or reasonableness of the tariff, being of opinion that such questions were in the first instance to be submitted to and determined by the Commission in appropriate proceedings. An injunction issued against the hotels but not against the telephone companies, the court, however, retaining jurisdiction over the proceedings as to all defendants for the purpose of issuing such further orders as might be necessary to effectuate its decision. Direct appeal was taken by the hotel defendants to this Court.[2]

It has long been recognized that if communications charges are to correspond even roughly to the cost of rendering the service, the use to which telephone installations may be put by subscribers must be subject to some kind of classification and regulation which will conform the actual service to that contracted for. Familiar examples are the classification of residence as against business service with a requirement that the subscriber confine his use of the instruments accordingly. Of course, the subscriber who installs a private branch exchange with multiple trunk lines and many extensions has obviously contracted for a class of service different from one whose installation consists of a single station. One of the problems incident to the service of a subscriber who takes facilities greatly in excess of his own needs in order to accommodate others is to fix upon what terms he may extend the use of telephone facilities to others. This is an aspect of the

[1] The opinion was rendered orally and is not reported.

[2] Pursuant to Section 2 of Expediting Act, 32 Stat. 823; 36 Stat. 1167; 15 U. S. C. § 29; 49 U. S. C. § 45; and Communications Act of 1934, 48 Stat. 1093, 47 U. S. C. § 401(d). Also § 238(1) of Judicial Code as amended, 43 Stat. 938, 28 U. S. C. § 345(1).

problem of resale of utility service which is not confined to the telephone business.[3]

The Communications Act of 1934 recognizes that tariffs filed by communications companies may contain regulations binding on subscribers as to the permissible use of the rented communications facilities. The supervisory power of the Commission is not limited to rates and to services, but the formula oft repeated in the Act to describe the Commission's range of power over the regulated companies is "charges, practices, classifications, and regulations for and in connection with such communication service". 48 Stat. 1070, 47 U. S. C. § 201(b). It is in all of these matters that the Act requires the filed tariffs to be "just and reasonable" and declares that otherwise they are unlawful.[4] By none of these devices may the companies perpetrate an unjust or unreasonable discrimination or preference.[5] All of these must be filed with the Commission in the form it prescribes, may not be changed except after due notice, and must be observed in the conduct of its business by the company.[6] These provisions clearly authorize the companies to promulgate rules binding on PBX subscribers as to the terms upon which the use of the facilities may be extended to others not themselves subscribers.

[3] Cf. Re New York Telephone Co., 26 P. U. R. (N. S.) 311 (N. Y. 1938), 30 P. U. R. (N. S.) 350 (N. Y. 1939); People *ex rel.* Public Service Commission *v.* New York Telephone Co., 262 App. Div. 440 (1941), aff'd without opinion, 287 N. Y. 803; Hotel Pfister *v.* Wisconsin Telephone Co., 203 Wis. 20 (1930); Jefferson Hotel Co. *v.* Southwestern Bell Telephone Co., 15 P. U. R. (N. S.) 265 (Mo. 1936); Re Hotel Marion Co., P. U. R. 1920 D, 466 (Ark. 1920); Connolly *v.* Burleson, P. U. R. 1920 C, 243 (N. Y. 1920); Re Hotel Telephone Service and Rates, P. U. R. 1919 A, 190 (Mass. 1918); Hotel Sherman Co. *v.* Chicago Telephone Co., P. U. R. 1915 F, 776 (Ill. 1915); 1015 Chestnut Street Corp. *v.* Bell Telephone Co. of Pennsylvania, P. U. R. 1931 A, 19, 7 P. U. R. (N. S.) 184 (1930, 1934); Budd *v.* Southwestern Bell Telephone Co., 28 P. U. R. (N. S.) 235 (Mo. 1939).

Remetering of electric energy creates similar problems of regulation, often dealt with by tariff prohibition of remetering. See Lewis *v.* Potomac Electric Power Co., 64 F. 2d 701 (App. D. C. 1933); Karrick *v.* Potomac Electric Power Co., P. U. R. 1932 C, 40 (D. C. Sup. Ct. 1931); Florida Power & Light Co. *v.* Florida, 107 Fla. 317 (1932); Sixty-seven South Munn *v.* Board of Public Utility Commissioners, 106 N. J. Law 45 (Sup. Ct. 1929), aff'd 107 N. J. Law 386 (Court of Errors and Appeals 1930), cert. denied, 283 U. S. 828; Public Service Commission *v.* J. & J. Rogers Co., 184 App. Div. 705 (N. Y. 1918); People *ex rel.* N. Y. Edison Co. *v.* Public Service Commission, 191 App. Div. 237 (N. Y. 1920), aff'd, 230 N. Y. 574 (1920).

[4] 47 U. S. C. § 201.

[5] 47 U. S. C. § 202.

[6] 47 U. S. C. § 203(a), (b), (c).

Of course, such authority is not unlimited. The telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business. But where a part of the subscriber's business consists of retailing to patrons a service dependent on its own contract for utility service, the regulation will necessarily affect, to that extent, its third party relationships. Such a regulation is not invalid *per se* merely because, as to the communications service and its incidents, it places limitation upon the subscriber as to the terms upon which he may invite others to communicate through such facilities.

It is urged, however, that the regulation in question is unlawful because it is unreasonable. It is said that it invades the relationship between hotel and guest excessively, and denies to the hotel the right reasonably to recoup its cost and to profit by the services it renders. But we agree with the District Court that where the claim of unlawfulness of a regulation is grounded in lack of reasonableness, the objection must be addressed to the Commission and not as an original matter brought to the court. We think that the Act confers jurisdiction upon the Commission to hear appellants' grievances against the substance of this regulation. Indeed, appellants inform us that the American Hotel Association, on behalf of its members, including the appealing hotels, has filed a formal complaint with the Commission alleging that the new provision of the tariff schedule was unreasonable, discriminatory and unlawful, and asking for investigation and, at the same time, asserting that the tariff was illegal. Action on that complaint has been held in abeyance by the Commission pending the final decision on the jurisdictional question in this suit.

It is clear that the charges being made in this case violate the regulation. The charges made are not based on the service rendered by the hotel but vary in accordance with the toll charge made by the telephone company for communications services. So far as appears, the service rendered by the hotel in handling a guest's toll call from Washington to Baltimore is substantially the same as for a call to San Francisco. But for like service, the charge varies with the amount of the telephone tariff for the communication. The guest's charges are so identified with the communications service that they are brought within the prohibitions of this regulation.

Since the regulation, apart from questions of reasonableness which must be presented to the Commission, is a valid regulation of the subscriber's use of the telephone facilities involved, a departure from the regulation is forbidden by the Act and the prosecution of an action to restrain a violation is authorized.[7] When an action for enforcement is instituted in any District Court, the Act expressly provides that it shall be lawful "to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation or practice under consideration", and decrees may be made against such parties in the same manner and to the same extent as authorized with respect to carriers.[8] One can hardly gainsay the Government's assertion that the appellants here are persons interested in and affected by the regulation in question and, therefore, are proper parties defendant in the action and injunction could properly issue against them.

It is urged, however, that inasmuch as the Court did not enjoin the telephone companies, the hotels should not be enjoined. Four days after the effective date of this regulation, the hotels had indicated no intention to comply with it although they had had due notice. It was well within the discretion of the trial court to conclude that this justified an injunction. Four days of default by the subscriber, however, might not be regarded as requiring an injunction which would compel the telephone companies to cut off service on which many persons rely. We are unable to see that the hotels have been prejudiced by the failure to enjoin the telephone companies or are in a position to complain of the omission of what would have been an additional hardship to themselves.

Much has been said in argument about the theory of the relationship between the hotel and the telephone company and the discrepancy between the view of the Commission that the contract created an agency and that of the District Judge who said that the evidence fails to show that the hotels are agents of the telephone company, and held that "the hotels are subscribers". We do not think it is necessary in determining the application of a regulatory statute to attempt to fit the regulated relationship into some common-law category. It is sufficient to say that the

[7] 47 U. S. C. § 401.
[8] 47 U. S. C. § 411.

relation is one which the statute contemplates shall be governed by reasonable regulations initiated by the telephone company but subject to the approval and review of the Federal Communications Commission.

Without prejudice to determination by the Commission of any of the questions raised in this case, we hold that the injunction was properly issued and the judgment below is

Affirmed.

Mr. Justice BLACK and Mr. Justice DOUGLAS took no part in the consideration or decision of this case.